91-1652

(1)

Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1991

IGNACIA DIAZ REYES, ETC. ET AL.,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this case should have been summarily dismissed when there is sufficient evidence in the record to establish that the Veterans Administration was negligent in administering a blood transfusion infected with A.I.D.S. to decedent.

2. Whether this case should have been summarily dismissed when there is sufficient evidence in the record to establish that the Veterans Administration was negligent in not informing the decedent and decedent's wife about her husband's A.I.D.S. condition after acquiring said knowledge.

LIST OF ALL PARTIES IN THE PROCEEDING

1. **Plaintiffs - Petitioners**

   Ignacia Diaz Reyes for herself and in representation of her minor son **Angel R. Negron-Diaz; Edgardo Negron Diaz,** and **Alma Digna Negron Diaz**

2. **Defendant - Respondent**
   United States of America

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray that a writ of certiorari issue to reveiw the judgment and opinion of the United Srates Court of Appeals for the First Circuit, entered in the above-entitled case on January 14, 1992.

OPINIONS BELOW

1. July 19, 1991 Opinion and Order of the United States District Court for the District of Puerto Rico and judgment summarily dismissing this case under all liability theories is reprinted in Appendix hereto, p. A-3.

2. January 14, 1992, Per Curiam 'Not for Publication' Opinion of the United States Court of Appeals for the First Circuit is reprinted in appendix hereto, p. A-1.

GROUNDS FOR JURISDICTION

Petitioner requests the Supreme Court of the United States to review the January 14, 1992 Per Curiam Opinion of the United States Court of Appeals for the First Circuit mentioned above, for this decision is in conflict with the Puerto Rico statutory law and with case law of the island's court of last resort, the Supreme Court of Puerto Rico, and this Supreme Court of the United States of America.

The Supreme Court of the United States has jurisdiction to review the judgment or decree in question under 28 U.S.C., sec. 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The following statutes and rules are pertinent to This Petition:

Puerto Rico

Article 1802 Puerto Rico Civil Code; 31 P.R.L.A. sec. 5141 (1930)

Federal

28 U.S.C. sec. 1254
28 U.S.C. sec. 1346 (2)(b)
38 U.S.C. 4132
Federal Rules of Civil Procedure, Rule 56
Public Law 100-322 of May 20, 1988; 102 Stat. 502, 503; 38 U.S.C. Sec. 7332
Federal Rules of Evidence, Rule 801, Rule 803(8), and Rule 804(b)(2)

The above statutes and rules are printed in Appendix E hereto, pp. A-14 to A-26.

STATEMENT OF THE CASE

This is an action pursuant to the Federal Torts Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code, to collect damages for the death of Mr. Angel R. Negron, who died of A.I.D.S. in 1988 due to a blood transfusion infected with the HIV virus given to him at the Veterans Administration Hospital in Puerto Rico and for failure of said hospital's personnel to take steps to prevent decedent from also infecting his wife after acquiring knowledge of his A.I.D.S. condition.

After finding that the United States could not be held liable under any theory for the death of Mr. Negron or his wife's exposure to being infected with the HIV virus, the United States District Court for the District of Puerto Rico (Jose Antonio Fuste — U.S. District Judge) summarily dismissed the complaint in this case, through its Opinion and Order of July 19, 1991.

A Notice of Appeal was filed on August 7, 1991. After argument was heard, the Honorable United States Court of Appeals for the First Circuit AFFIRMED the judgment of the U.S. District Court, through its Per Curiam 'Not for Publication' Opinion of January 14, 1992. A Motion for Rehearing in Banc filed on January 28, 1992 is pending resolution in said Appellate Court.

According to the record in the present case, the decedent, Mr. Angel R. Negron had been suffering since 1961 of "stomach problems" or "ulcers". After his retiring from active military service in 1979, he began a series of continuous visits to the Veterans Administration Hospital in Puerto Rico for the treatment of his peptic ulcer disease.

On March 16, 1981, Mr. Negron was admitted to the Veterans Administration Hospital in San Juan for abdominal pain and internal bleeding. During this admission, the doctors in charge of Mr. Negron decided to utilize surgical procedures. Surgery took place on March 26, 1981. During the intervention Mr. Negron received a blood transfusion.

A few days after, on April 1, 1981, Mr. Negron was isolated in a "V.A." ward, for suspected hepatitis. Because of his weak, severe condition caused by the newly acquired hepatitis, Mr. Negron received a second blood or blood product transfusion at the Veterans Administration Hospital in Puerto Rico on April 8, 1981.

Previous to the surgical intervention of March 26, 1981, Mr. Negron had never suffered from hepatitis. This unexpected condition was tied to the blood transfusion received during the operations both by a Dr. Marin Cancel, the operating surgeon, and subsequent medical evaluations.

After discharge from the Veterans Administration Hospital on April 16, 1981, Mr. Negron never fully recovered. On September 24, 1984 he was readmitted to the Veterans Administration Hospital to be operated for a right cervical node. His general condition at the time included weight loss and anemia. On this same date, the V.A. medical staff acknowledged Mr. Negron's health condition and did make a note of the need for isolation of the patient and instructed its personnel to take A.I.D.S. precautions. Furthermore, there are notations that indicate that Mr. Negron had referred that he had had "multiple female sexual contacts, one of which died of pulmonary embolism and A.I.D.S. in the medical center last April-May (of 1984)". The person who made the entry has not been identified as to his/her position or whether he or she exists.

Although Mr. Negron was not submitted to an HIV test until June of 1988, the medical record shows that he was HIV positive since April of 1988. He died of A.I.D.S. on August 9, 1988. Before his death he denied having had any form of sexual relationship with any other woman but his wife, as well as denying homosexuality or drug use and blamed the blood transfusions received at the Veterans Administration for his A.I.D.S. condition.

ARGUMENT

I. WHETHER THIS CASE SHOULD HAVE BEEN SUMMARILY DISMISSED WHEN THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO ESTABLISH THAT THE VETERANS ADMINISTRATION WAS NEGLIGENT IN ADMINISTERING A BLOOD TRANSFUSION INFECTED WITH A.I.D.S. TO DECEDENT.

According to the Opinion and Order of the Honorable District Court in this case, the complaint never formally raises the spectre of negligence with respect to whatever prior act or omission placed Negron in the position of needing a transfusion in the first place as "required" in *Gaffney* v. *United States*, 1990 U.S. Dist. LEXIS 5184 (CV No. 88-1457-Z), April 26, 1990.

In *Gaffney*, *supra*, a Naval Hospital was held liable for causing the AIDS disease through a blood transfusion administered in 1981, although at the time the hospital could not have had a duty to test for A.I.D.S. in its blood supply. There, the trial court determined that, following the test articulated in the Restatement (Second) of Torts 435 (1) (1965): "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." *This is also the law in Puerto Rico. Gines Melendez* v. *AAA*, 86 P.R.R. 490 (1962); *Vda. de Andino* v. *AFF*, 93 P.R.R. 168 (1966); *Pabon* v. *Axtmayer*, 90 P.R.R. 20 (1964); *Colon* v. *Shell Co.*, 55 P.R.R. 575 (1939); *Cruz Costales* v. *ELA*, 89 P.R.R. 102 (1963); *Goose* v. *Hilton Hotels*, 79 P.R.R. 494 (1956).

In *Gaffney*, *supra*, the Naval hospital, because of negligence in performing the delivery of a baby in due time caused the patient to need a blood transfusion, which was later determined to have been HIV contaminated. Also, the court in *Gaffney* concludes that:

"The parties agree that AIDS was not a known risk associated with transfusions in September of 1981. Indeed, according to Dr. John W. Ward, an epidemiologist with the Center for Disease Control, the first mention of AIDS as a disease did not occur until September, 1982, and the first antibody test was not devised until 1985. However, the experts were unanimous that it was well known in 1981 that transfusions can transmit many diseases, some of which could be fatal and for some of which no screen had been developed. They included, for example, hepatitis of several kinds, syphilis, malaria and a number of viruses. *Thus infection with a communicable disease was a foreseeable consequence of administering blood to a patient even in 1981.*" (our emphasis).

With regards to this first issue, there is evidence in the record to prove that Mr. Negron, the decedent in this case, received two blood or blood product transfusions during his stay at the Veterans Administration Hospital in 1981. The first of these transfusions was administered to him during his operation of March, 1981 and a plasma was later transfused in April of 1981. Medical Record at Page 86A.

In her deposition, at page 32, decedent's widow states as follows under oath:

"Q. From my review of the medical records, your husband did not have another transfusion until 1988, is that correct?

A. That's correct.

Q. So when you say he had several, those were really after he was diagnosed as having AIDS, is that correct?

A. When he had the hepatitis he got real bad, because his liver went hard on him.

Q. My question just was that he had one transfusion in 1981 and then he had other transfusions in 1988, but when he got those transfusions was that not after he had been diagnosed as having AIDS?

A. That I know of, he had three transfusions, one in '81, and then another one, they had a plasma put on him to try and help him out with his liver, but he rejected it, and then the other one in '88.
Q. So the plasma that you are talking about was in 1981?
A. That's correct."

Petitioners also argue that there is abundant evidence in the record to establish that the first blood transfusion was contaminated with hepatitis B-type and possibly A.I.D.S. Being that hepatitis was caused by the hospital personnel's negligence in not testing its blood banks for hepatitis, it was this negligence that was the proximate cause of the need for a second blood product transfusion which could have been the A.I.D.S.-causing agent.

Previous to the surgical intervention of March 26, 1981, Mr. Negron had never suffered from hepatitis. This unexpected condition was tied to the blood transfusion received during the operation both by Dr. Marin Cancel, the surgeon in charge of the operation, and subsequent medical evaluations. See Medical Records at pages 35B, 117A (overt) 193A, 245A, 248A, 308A, 315A, 316A, *all identifying the hepatitis condition as secondary to blood transfusion*. Mr. Negron's hepatitis condition was caused by a blood transfusion administered during his operation of March 26, 1981. F.R.E. 801(2).

Respondent relies on page 107A of the Medical Record to say that there was not a blood transfusion during the operation. Yet, this statement in the Medical Record was written ten (10) days after the operation by someone who probably was not a member of the medical crew at this operation room, and is virtually contradicted by the rest of the record.

According to modern science, the transmission of HIV occurs only through blood, sexual activity and perinatal events. In Mr. Negron's case, plaintiffs and defendant theorize for blood vs. sexual activity respectively. Puerto Rican case law has established that it is not necessary to show the unique and exact cause of a damage. *It is enough that the movant proves, by a pre-*

ponderance of evidence that the negligent conduct was the ingredient most probable to cause it. Nunez v. *Cintron*, 116 D.P.R. 598, 617 (1984). *Berrios* v. *UPR*, 116 D.P.R. 88, 101 (1985).

Shortly before his death, Negron denied having had sexual relations outside of marriage. There exists a genuine issue of material fact as to the cause of his A.I.D.S. illness. F.R.E. 804 (b) (2).

At page 308A of the medical record, the medical staff at the Puerto Rico Veterans Administration Hospital themselves annotated the following on July 29, 1988 "*patient with HIV presumed to be secondary to transfusion, also (illegible) of hepatitis B.*" F.R.E. 801 (2).

Negron's A.I.D.S. condition was tied to previous blood transfusions by the Veterans Administration Hospital itself.

Hospitals had a duty to test their blood supplies because in 1981, although A.I.D.S. was unknown, the medical profession understood that transfusions could transmit many diseases including hepatitis, syphilis and malaria. The physician's liability for transmitting a lethal, unknown disease to a patient, and subsequently to his family members is determined by the legal rule that if the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.

Infections with a communicable disease was a recognized risk of transfusion in 1981, the exact injury suffered by the plaintiff need not have been foreseen. See Jenner, Robert K. *Transfusion-Associated A.I.D.S. and Medical Liability*, Trial magazine — May, 1991, pages 29 to 33.

In our case, there is sufficient evidence in the record to show that the decedent first acquired his condition of hepatitis at the surgical room of the Veterans Administration Hospital through a blood transfusion, during his operation of March 26, 1981. Although in 1981 there may not have existed a duty for hospitals to test their blood supply for A.I.D.S., *there existed such a duty at the time to test for the type of hepatitis transmitted to Mr.*

Negron, which was then a well known communicable disease for which tests were available. (Australian Antigen Test) In not conducting the necessary blood tests and in giving Mr. Negron a blood transfusion contaminated with the hepatitis virus, the United States was negligent and did not meet the standard of care required by the medical profession.

The fact that no blood tests were conducted to identify the hepatitis virus in the blood administered to Mr. Negron makes it more probable and tends to prove that no tests whatsoever were conducted to identify any and all communicable diseases. In the case at bar, the Veterans Administration Hospital should be and is responsible for *any* communicable diseases acquired by the patient through this first blood transfusion, including eventually A.I.D.S., for it foresaw or should have foreseen as a prudent and reasonable person that there existed a reasonable risk of harm, although it could not have foreseen the specific damage (A.I.D.S.) or the particular manner in which said damage would occur. *Gines Melendez, supra.*

Moreover, if Mr. Negron's A.I.D.S. condition was caused by the second blood transfusion administered to him on April 4, 1981 such second transfusion was the result of prior negligent acts or omissions which placed him in the position of needing the plasma. This is, negligence in blood testing, which caused hepatitis, which in turn placed him in need of a second blood or blood product transfusion. *Gaffney, supra.*

Blood transfusion-caused A.I.D.S. is the only logical circumstantial cause of Mr. Negron's death, which can be proven by a preponderance of the evidence during a trial.

Thus, the Honorable District Court erroneously concluded that "there are no facts anywhere in the record to support the proposition that Mr. Negron needed a transfusion due to a prior negligent act of defendant." Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure when there is no genuine issue as to any material fact and judgment is proper as a matter of law. There is no genuine issue of material fact only when the *record as a whole* could lead a rational

trier of fact to find for the non-moving party. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). Any relevant factual material having reasonable weight may show existence of a genuine issue of material fact and thus avoid summary judgment under FRCP 56, even if not then in admissible form, for example, because it may be then-inadmissible hearsay. *Offshore Aviation* v. *Transcom Liens*, 831 F.2d 1013, 1015 & n.1 (11th Cir. 1987), quoting *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986) and the language of FRCP 56 which fails to mention admissibility.

Appellate review of summary judgment is plenary. *Olivera* v. *Nestle*, CA No. 90-1363, Slip Op. of December 27,. 1990 (1st Cir.); *Garside* v. *Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990); *Mack* v. *Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989). In making its review, the appellate court looks at the record in the light most favorable to the party opposing summary judgment and accepts all reasonable inferences favorable to such party arising from the record. *Garside* v. *Osco Drug, Inc.*, *supra; Greenburg* v. *Puerto Rico Maritime Shipping Auth.*, 835 F.2d 932, 934 (1st Cir. 1987).

Apart from the discussion following about the Veterans Administration's negligence and breach of duty in not informing appellant Ignacia Diaz, the decedent's wife, about her husband's suspected AIDS condition in time to take steps necessary not to become HIV infected through sexual relations with husband, the V.A. could also be held directly liable for her present anxiety and mental anguish, as well as for any future HIV positive results. This is because it was foreseeable in 1981, as well as today, that communicable diseases can be transmitted to close family members thus creating an undue risk of harm.

In *Gaffney*, *supra*, the court held that:

> "Concerning the claims of family members, the government correctly points out the plaintiff must show that he and his son were within the 'orbit of risk' as formulated by Justice Cardozo in *Palsgraf* v. *Long Island R.R.*, 248 N.Y.

339, 162 N.E. 99 (1928). However, the next question is not, as the government would have it, whether plaintiff's and John Martin's AIDS-related injuries were foreseeable. Rather, it is whether defendant's negligence created an undue risk of harm and whether the injuries to the family members resulted directly from the same breach of duty. That is the rule in California. For example, in *Weirum* v. *RKO General Inc.*, 15 Cal. 3d 40, 530 P.2d 36, 123 Cal. Rptr. 468 (1975), a radio station was held liable when listeners following a disc jockey caused a fatal automobile accident because the victim was exposed to a foreseeable risk of harm. Here the negligent treatment of Mutsuko created a serious risk of harm and the injuries to plaintiff and John Martin resulted directly from the same breach of duty. Accordingly, I conclude that the government's legal responsibility extends to these family members.

In summary, I find that defendant was negligent in the treatment of Mutsuko, that it was foreseeable in 1981 that a communicable disease could be transmitted through a blood transfusion. I further find that the government's liability extends to the family members to whom the disease was also communicated."

In Puerto Rico, see *Alvarez* v. *Hernandez*, 74 P.R.R. 460 (1953); *Rodriguez Ramirez* v. *Frank Viera*, 86 P.R.R. 727 (1962); *Gines Melendez* v. *AAA*, 86 P.R.R. 490 (1962); *Rivera Matos* v. *Amador*, 86 P.R.R. 812 (1962); *Ramos* v. *Carlo*, 85 P.R.R. 337 (1962).

II. WHETHER THIS CASE SHOULD HAVE BEEN SUMMARILY DISMISSED WHEN THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO ESTABLISH THAT THE VETERANS ADMINISTRATION WAS NEGLIGENT IN NOT INFORMING THE DECEDENT NOR DECEDENT'S WIFE ABOUT HER HUSBAND'S A.I.D.S. CONDITION AFTER ACQUIRING SAID KNOWLEDGE.

Because of veteran's benefits offered by the United States, the Veterans Administration Hospital became Mr. Negron's sole source of medical treatment, counseling and intervention from 1981 to his death in 1988.

On September 24, 1984, Mr. Negron was readmitted to the Veterans Administration Hospital to be operated from a right cervical node. His general condition at the time included weight loss and anemia. On this same date, the V.A. medical staff acknowledged Mr. Negron's health condition and did note the need for isolation of the patient and instructed personnel to take AIDS precautions. Medical Record on pages 175A, 193A and 207A (overt).

Although the ELISA test was not available in 1984, symptomatic A.I.D.S. diagnosis had been made since early 1981. Mr. Negron had A.I.D.S. symptoms and said diagnosis was written down in the medical record as "A.I.D.S. Precautions" to be taken. The Veterans Administration knew or should have known about Negron's A.I.D.S. condition.

In fact, the ELISA test was available five (5) months later, in February of 1985. Although there were clear "A.I.D.S. Precautions" annotations in Mr. Negron's medical records, neither him nor his wife were ever told about this A.I.D.S. situation. Furthermore, he continued ambulatory visits to the hospital from 1984 to 1988, and in all these years he was not recommended for HIV testing nor was his wife informed about this deadly risk to her health.

In its Appellate brief, at pages 2, 10 Petitioner clearly stated that, according to the record, after they learned he had A.I.D.S. in 1988, Negron and his wife refrained from having

marital relations (deposition of Ignacia Diaz Reyes, at pages 54-56) which tends to prove and makes more probable that if Negron had known of his condition in 1984 he would have refrained from sexual contact with his wife from an earlier date, which he didn't do.

Negron was not informed about his suspected A.I.D.S. condition by the Veterans Administration Hospital. He didn't know, and therefore could not take preventive measures in relation to his wife and family members. Once he knew in 1988, he wanted to abandon his home for his family's safety.

In other words, ever since 1984, the Veterans Administration Hospital in Puerto Rico knew or at least had a very strong perception of Mr. Negron's A.I.D.S. condition. According to the medical record, and to the testimony in this case, not a word was said to him about this possibility, not one recommendation, orientation or preventive measure to be taken. Abstaining from sexual contacts with his wife should have been an extremely important directive since the death of the woman annotated in the record could have been caused by Mr. Negron as a primary HIV carrier. At the time, only certain medical records relating to drug abuse, alcoholism or alcohol abuse, or sickle cell anemia were held to be confidential at the Veterans Administration Hospital according to 38 U.S.C. sec. 4132.

The HIV test was developed, approved and available for use in 1985. Yet, notwithstanding the fact that the V.A. Administration had in their possession since 1984 information about Mr. Negron's possible A.I.D.S. condition, and alleged knowledge about heterosexual transmission of the virus, no attempt was undertaken to contact Mr. Negron to recommend HIV testing or to protect his wife.

In its Opinion and Order, at page 10, the District Court determined that under the applicable state law the privileges between the patient and the V.A. medical staff in charge was "strong". The state law and the Supreme Court of Puerto Rico have dictated precisely the opposite. The tendency is for the restriction of the physician-patient privilege. See *Garcia Negron*

v. *Tribunal Superior*, 104 P.R.R. 727 (1976). It is well-settled that "there is no common law physician-patient privilege, and none has been afforded in the federal courts as a general evidentiary principle." *Robinson* v. *Magovern*, 83 F.R.D. 79, 90 (1979). The privilege is in a real decay and probably, in its extinction. See McCormick on Evidence, sec. 105; The Policy and Future of the Privilege.

Regarding the duty of confidentiality before any judicial action is commenced, it has several exceptions which must be considered to avoid a third party injury or even a wrongful death. The medical community has recognized this overriding interest and it has been codified in the current Opinions of the Judicial Council of the American Medical Association, section 5.05 at 19 (1984):

> "5.05. Confidentiality — The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.
>
> The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to another person and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authori-

> ties. Also *communicable diseases*, gun shot and knife wounds, should be reported as required by applicable statutes or ordinances." (emphasis supplied)

An illustrating analysis comes from the opinion in *Tarasoff* v. *Regents of the University of California*, 551 P.2d 334 (1976), where the court held that a physician or the health care provider has a duty to exercise reasonable care to protect the foreseeable victim which in our case was the decedent's wife and plaintiff-appellant herein. It is a recognized general rule that the health care provider is liable for negligence in permitting persons to be exposed to infectious diseases. 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers, sec. 245 (1981).

A prohibition against disclosure of information as to AIDS victims at the Veterans Administration did not occur until 38 U.S.C. 4132 was amended by Public Law 100-322, on May 20, *1988*, 102 Stat. 502, 503. This is, two and a half months before Mr. Negron's death and one month before he was submitted to an HIV test at the V.A. Hospital in Puerto Rico.

Even with the prohibition in the *1988* amendment, according to sections (f) (1), 2 (A) (B) (g), a V.A. professional counselor or physician may disclose information or records indicating that a patient or subject is infected with the human immunodeficiency virus if the disclosure is made to the spouse or sexual partner of such patient after making reasonable efforts to encourage the patient to provide the information to the spouse or sexual partner and believing he or she will not inform.

The Veterans Administration Hospital in Puerto Rico had every reason to believe that the decedent Mr. Negron was infected with the HIV virus since 1984. It was negligent in not taking the necessary steps to alert Mr. Negron or his wife about this situation and to prevent appellant Ignacia Diaz from also becoming an A.I.D.S. victim through sexual relations with her husband. It had this duty from 1984 to 1988. Only after the amendments of 1988 to 38 U.S.C. 1432 may it have become a possibility for the V.A. personnel to allow a patient to transmit

to his or her spouse a deadly disease for which there is no medical cure or treatment without informing this fact to the spouse.

> "*Courts that have addressed this problem of infectious-disease cases universally impose liability.* They emphasize that foreseeability of the harm to the third party is the most important consideration. These cases exemplify the principle established in *Restatement sec. 324A holding a tortfeasor liable for the foreseeable injuries to third parties caused by negligent conduct.*
>
> In a recent Pennsylvania Supreme Court decision, the court relied on this section in holding a physician liable to a sexual partner of a patient who had been inadvertently stuck with a needle. The physician erroneously informed the patient that if she remained symptom-free for six weeks, she was not infected by the hepatitis virus. The court wrote:
>
> When a physician treats a patient who has been exposed to or who had contracted a communicable and/or contagious disease, it is imperative that the physician give his or her patient the proper advice about preventing the spread of the disease. Communicable diseases are so named because they are readily spread from person to person. Physicians are the first line of defense against the spread of communicable disease, because physicians know what measures must be taken to prevent the infection of others. The patient must be advised to take certain sanitary measures or to remain quarantined for a period of time, or to practice sexual abstinence or what is commonly referred to as "safe sex."
>
> Such precautions are taken not to protect the health of the patient, whose well-being has already been compromised, rather such precautions are taken to safeguard the health of others. Thus, the duty of a physician in such circumstances extends to those "within the foreseeable orbit of risk of harm."

> The physician's failure to advise the patient properly was a sufficient basis for the sexual partner's action for medical negligence. *D. Marco* v. *Lynch Homes*, Civil No. J-93-1990 slip op. (Pa. April 6, 1990) Jenner, op cit, page 32.

See *Jones* v. *Stanko*, 160 N.E. 456 (Ohio 1928) (physician failed to report case of smallpox to public authorities, foreseeably resulting in the death of a third party); *Wojeik* v. *Aluminum Co.*, 183 N.Y.S.2d 351, 358 (N.Y. Sup. Ct., special term, Erie Cty. 1959) (wife could maintain action against husband's physician for failing to advise husband that he had tuberculosis; 'such a risk is within the range or probability and apprehension of an ordinarily prudent person'); *Hofmann* v. *Blackmon*, 241 So.2d 752 (Fla. Dist. Ct. App. 1970) (a physician is under a duty to advise and warn members of a patient's immediate family of the existence and dangers of a communicable disease (i.e., tuberculosis)). *Cf. Edwards* v. *Lamb*, 45 A. 480 (N.H. 1899) (physician asked wife to assist in dressing the wounds of her husband; physician liable for advising the wife that there was no danger to her of becoming infected). Jenner, Ibid, page 33.

In the case at bar, the Veterans Administration was negligent and failed to act as a prudent and reasonable person when it did not inform Mr. Negron nor his wife about his A.I.D.S. condition. Article 1802, Puerto Rico Civil Code, 31 P.R.L.A. 5141 (1930).

CONCLUSION AND RELIEF SOUGHT

Summary judgment is appropriate only in the absence of a "genuine dispute as to any material fact and when the moving party is entitled to judgment as a matter of law." Federal Rules of Civil Procedure 56(c). For purposes of summary judgment, facts are construed in the *light most favorable to the non-moving party*. In reviewing the correctness of summary judgment, courts determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether

it is so one-sided that one party must prevail as matter of law. *Anderson* v. *Liberty Lobby*, 477 U.S. 2142, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986); *De Arteaga* v. *Pall Ultrafine Filtration Corp.*, 862 F.2d 940, 941 (1st Cir. 1988). The examination turns on whether there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *De Arteaga*, 862 F.2d at 941, quoting *Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2511. See *Kaiser* v. *Armstrong World Industries, Inc.*, 872 F.2d 512, 517 (1989). These conditions were not met with regard of the summary dismissal in this case.

For the reasons set forth in this brief, the trial court clearly erred in summarily dismissing the present case, in this way denying plaintiffs of their day in court and the opportunity of recovering a compensation for the physical, mental and emotional damages they have suffered due to defendant's negligence.

This Honorable Supreme Court of the United States must, in the best interest of substantial and procedural justice reverse the judgment of the trial court, summarily dismissing the complaint in this case.

WHEREFORE, Petitioners respectfully request of this Honorable Supreme Court that it REVERSE the judgment of the District Court of July 19, 1991.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1859

IGNACIA DIAZ REYES, ETC., ET AL.,
PLAINTIFFS, APPELLANTS,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. JOSE ANTONIO FUSTE, *U.S. District Judge*]

Before
TORRUELLA, ALDRICH AND SELYA, *Circuit Judges*.

Bernardo Vazquez, with whom *David Efron* was on brief, for appellants.

Marie Louise Hagen, Trial Attorney, Torts Branch, Civil Division, U.S. Dept. of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jeffrey Axelrad*, Director, Torts Branch, and *Daniel F. Lopez-Romo*, United States Attorney, were on brief, for appellee.

January 14, 1992

Per Curiam. Having carefully reviewed the record and the briefs, we are of the opinion that the court below correctly granted the government's motion for summary judgment. To go further would serve no useful purpose. Therefore, we affirm the judgment for substantially the reasons limned in the district court's opinion, *Diaz Reyes* v. *United States*, 770 F.Supp. 58 (D.P.R. 1991).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1859

IGNACIA DIAZ REYES, ETC., ET AL.,
PLAINTIFFS, APPELLANTS,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

JUDGMENT

Entered: January 14, 1992

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc: Mr. Vazquez and Ms. Hagen]

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF PUERTO RICO

Civil No. 89-1716 (JAF)

IGNACIA DIAZ REYES, FOR HERSELF AND IN REPRESENTATION OF HER MINOR SON ANGEL R. NEGRON DIAZ, EDGARDO NEGRON DIAZ, AND ALMA DIGNA NEGRON DIAZ,

PLAINTIFFS,

v.

UNITED STATES OF AMERICA,

DEFENDANT.

OPINION AND ORDER

Plaintiffs are the widow and three children of Angel Negron. Negron received a blood transfusion at a Veterans Administration hospital in San Juan, Puerto Rico, in April of 1981. He tested positive for AIDS in June of 1988, and died on August 8, 1988. In the vague complaint filed in this action, plaintiffs allege that 1) the defendant was negligent in giving Negron a transfusion tainted with AIDS, and 2) the defendant was negligent in failing to inform either Negron or his wife about the presence of the AIDS virus, such failure which resulted in continuation of conjugal relations between the couple, and which therefore placed Ignacia Diaz Reyes at risk of contracting the AIDS virus. Although the wife has tested negatively for the AIDS virus, she suffers from anxiety that she may someday test positive and contract the disease.

During the course of this case to date, plaintiffs have come up with or at least hinted at several lines of attack not included in the original complaint, or which are refinements or variations

on a theme of the general causes of action as alleged in the complaint. Since plaintiffs fail to explain these new concepts with any degree of clarity (and indeed have failed to seek to amend their complaint for the purpose of redefining their causes of action), we will attempt to do so. We will take up each aspect of plaintiffs' case in turn.

Was the Need for a Transfusion Brought On By Negligent Acts of the Defendant?

The complaint never formally raises the spectre of negligence with respect to whatever prior act or omission placed Negron in the position of needing a transfusion in the first place, but repeated reference to the case of *Gaffney* v. *United States*, 1990 U.S. Dist. LEXIS 5184 (CV No. 88-1457-Z, April 26, 1990), indicates that plaintiffs would like us to consider this theory.[1] In that case a pregnant woman was under the care of doctors at a Naval hospital. The hospital staff negligently failed to induce labor at a time when accepted medical practice would have called for such a procedure. The woman gave birth two days later to a still-born child. Complications from the late birth resulted in a need for a blood transfusion. The blood was contaminated with AIDS, and the woman eventually contracted the disease and died as a result of it.

Since the transfusion took place in 1981, at a time when AIDS was only beginning to surface, the court found that the hospital could not have had a duty to test for AIDS in its blood supply. The court did, however, accept the theory that all transfusions carry some foreseeable risk, and that by placing the plaintiff in a position to *require* a transfusion when she would not otherwise have needed one, the hospital was liable for whatever harm the transfusion caused, whether that specific harm could have been foreseen at the time or not.

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[1] We would not ordinarily sanction reference to an unpublished opinion, but in this situation the existence of the case, as such, helps to explain plaintiff's theory on this point.

Plaintiffs fail to give us any Puerto Rico law on the issue of tort foreseeability as it would relate to liability in this type of scenario. We will therefore generously assume that Puerto Rico law would allow recovery on the same theory that was employed in the *Gaffney* decision. The problem is that plaintiffs also fail to adduce *any* facts to support the proposition that the medical necessity giving rise to the transfusion was negligently caused by the defendant. The complaint alleges that Negron went into the hospital in 1981 for treatment relating to a preexisting hepatitis condition, and was given the transfusion on that occasion. There is no detail as to why a transfusion was needed, and absolutely no facts alleged to support the proposition that defendant caused whatever situation made the transfusion necessary. Plaintiffs cannot create a substantial issue of material fact merely by a bare allegation that the transfusion was needed as a result of a condition caused by defendant's negligence, and thereby shift the burden of proof to the defendant to disprove that fact. Plaintiffs have simply "fail[ed] to make a showing sufficient to establish the existence of an element essential to [plantiffs'] case, and on which [plaintiffs] will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). There are no facts anywhere in the record to support the proposition that Negron needed a transfusion due to a prior negligent act of defendant.

Did Defendant Fail to Inform Negron of the Risks Inherent in Transfusion?

This theory is also not formally included in the pleadings, is also not supported by reference to Puerto Rico tort law, and also ultimately fails for a complete absence of factual allegation. We look to the case of *Kozup* v. *Georgetown University*, 660 F.Supp. 1048 (D.D.C. 1987), *aff'd in part and vacated in part*, 851 F.2d 437 (D.C. Cir. 1988), *aff'd after remand*, 906 F.2d 783 (D.C. Cir. 1990). In *Kozup*, a baby was born prematurely, and had complications which made transfusions necessary. The

transfusions were completed in January of 1983. The blood contained the AIDS virus and the baby eventually contracted the disease and died. The parents sued the hospital, alleging, *inter alia*, that the hospital had failed to inform them of the risk of AIDS. The district court held, and the appellate court affirmed, that in 1983 there was virtually no way in which any reasonable medical provider could have known about the risk of AIDS from blood transfusion, since the disease was only then being diagnosed and identified for the first time. The court went on to find that even assuming that the hospital could have accurately estimated the risk of contracting AIDS which a transfusion would entail, that risk was so infinitesimal at the time, and the medical consequences of not *opting for a transfusion so severe, that no reasonable parent could have failed to consent to the procedure.* The court then looked to the elements of the tort of failure to disclose, and found that one element is that the failure *caused* the injury, in that a proper disclosure would have resulted in a different decision. Since the court found that the disclosure to the parents could still not have changed their minds regarding the procedure, the court found that summary judgment on that cause of action was appropriate.

Since plaintiffs give us no Puerto Rico tort law to define their cause of action, we assume for the sake of our present discussion that this jurisdiction would recognize the tort in the same way as it was recognized in *Kozup*. Therefore, if plaintiffs could show that some duty to warn about AIDS existed in 1981, or some duty to warn about the general risk of transfusions existed, that the warning was not given, and that if it had been given, Negron would have opted not to have the transfusion, they might have a cause of action. There are no facts on record which tend to show either that Negron was not warned generally about blood transfusions, or that, assuming he was not warned, the failure to warn "caused" his illness, in the sense that if warned he would not have consented. Plaintiffs cannot rest on a bare allegation, fishing for a cause of action by shifting the burden to the defendant to disprove it. Plaintiffs do not have even the minimum of facts needed to go forward on this theory.

Was There Consent, Informed or Otherwise?

As the appellate court in *Kozup* noted, a failure to warn may render a consent uninformed, but a whole separate tort (battery) may lie if no consent was given whatsoever. *Kozup*, 663 F.2d at 439. Again, plaintiffs have no proof of the theory that Negron did not consent to the procedure in 1981. We will not shift the burden to the hospital in the absence of any cognizable shred of evidence on plaintiffs' side with which to proceed.

Was There a Negligent Failure to Test the Blood?

The *Kozup* case deals extensively with the medical chronology of AIDS. It appears from the decision that no possible test for the presence of the virus in blood was even contemplated in 1981. In fact, only the first cases of infected persons were being discovered, and the theories that the disease was transmitted by blood were only in the nascent stage. *Kozup*, 663 F.Supp. at 1051. Of course, we cannot accept the factfinding of another court in a different case. But plaintiffs have a duty, as the party charged with the burden of proof, of coming forward with some evidence of each element of its claim. One element of its claim as to the tort of failure to adequately screen the blood for the AIDS virus is that such screening was at least technically available at the time of the alleged negligence. We would have allowed plaintiffs to raise a material issue of fact as to this issue with as little as a single expert affidavit claiming that hospitals or blood banks *could* have employed some known procedure in 1981 to screen for AIDS. Plaintiffs produce nothing.

Hepatitis?

Plaintiffs' complaint alleges that in 1981 Negron was suffering from hepatitis, and that it was during treatment related to the hepatitis that he got the transfusion tainted with AIDS. In recent documents plaintiffs argue that decedent got both AIDS

and hepatitis from the transfusion. This allegation is directly contradicted by the medical record. Decedent suffered from hepatitis before he ever got the transfusion. The transfusion took place on April 8, 1981 (Exhibit A to Defendant's motion for summary judgment, p. 86A, "Record of Transfusion"). The record shows that on March 31, 1981, nine days *before* the transfusion, defendant's medical staff had alerted to the possibility of hepatitis (Ex. A, p. 74A). By April 3rd, he had tested positively for the disease, had been isolated, and had been given an "infectious disease consultation." (Ex. A, p. 72A). Plaintiffs produce no fact to contradict what is clear in the medical records: decedent already had and was being treated for hepatitis on the date that the transfusion at issue here took place. Although there always exists the possibility of a coincidence, that hepatitis-laced blood was transfused into decedent, who was already suffering from hepatitis, plaintiffs produce no evidence to indicate that that was the case here.

Failure to Inform Negron

Plaintiff Diaz Reyes alleges that she and her husband learned that he was suffering from the AIDS virus in June of 1988, shortly before he died. Plaintiff claims, without specifying a date, that defendant knew about Negron's illness long before that. She claims, first, that defendant failed to advise Negron himself that he was infected. Second, she claims that defendant failed to warn her that her husband was infected by the AIDS virus. The harm from the failure to advise is that the plaintiff and her husband continued to engage in conjugal relations without taking any preventive measures against the transmission of AIDS. Upon learning of her husband's infection in June of 1988, plaintiff began to suffer severe emotional distress caused by the fear that she was going to contract AIDS. Plaintiff has repeatedly tested negative for the AIDS virus, but plaintiff alleges that current medical technology does not rule out the possibility that she is in fact infected, so her fear continues.

First as to informing Negron. Plaintiffs have the burden of proving that the defendant knew or should have known at some time prior to June of 1988 (the date at which plaintiff Diaz Reyes admits she and her husband were informed of the virus) that Negron was infected with AIDS, and they they failed to inform him of that fact. We will accept without argument that plaintiff and Negron continued conjugal relations up until some time close to his death and that from June of 1988 until the present she suffers from a fear of AIDS. We look to the facts alleged which tend to prove the issues in dispute.

Plaintiff has the records from her husband's hospitalization in 1984. The hospitalization appears to have been in response to abdominal pain and a biopsy on a neck lymph node. The September 1984 hospital records show that Negron:

> described history of multiple sexual contacts through his military and civilian career. He denies homosexual contact; one lover, a drug addict, he refers dies in the Medical Center of pulmonary embolism but had been diagnosed AIDS.
>
> * * *
>
> [Negron] now relates he has had various female sexual contacts one of which he refers died of AIDS in the Medical Center last April-May.

Although not without ambiguity, these notes tend to indicate at least that some medical personnel employed by defendant as early as September of 1984 suspected that Negron might have been exposed to AIDS. We will therefore assume that most generous interpretation for plaintiffs' case, that defendant knew, or should have known that Negron had or was at risk for AIDS in 1984. We will assume that defendant had a duty to inform Negron of their suspicions.[2]

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[2] This assumption itself is by no means secure. If in 1984 there was no valid test for AIDS and no reason to believe that it was transmitted sexually, defendant may not have had a duty at all. We make the assumption in order to indulge plaintiffs' case at every conceivable turn.

The problem is with the next link in the chain. Plaintiffs must prove that defendant *failed* to inform Negron of his potential risk for AIDS. Plaintiffs must proffer some admissible proof on that issue to survive this motion. A mere allegation is not sufficient. Plaintiffs produce nothing. The only evidence which even begins to tend towards the needed proof is the fact that Negron never told plaintiff Diaz Reyes that he was at risk for AIDS. We do not see how any reasonable trier of fact could find by a preponderance of the evidence that defendant failed to inform Negron of his condition simply by the fact that Negron failed to inform his wife.

Failure to Inform Plaintiff Diaz Reyes

Plaintiff Diaz Reyes alleges that the defendant had an independent duty to inform her of her husband's condition. This would presumably have meant that even if he did not want to share the information with his wife, the hospital had a duty to inform her independently. This claim, of course, raises several problems. The first is whether a medical caretaker has any duty whatsoever to inform non-patients of the condition of a patient. Second is the question as to whether a medical caretaker has the right to disregard the privacy interests of the patient and through doing so violate the doctor-patient confidentiality. Our independent review of Puerto Rico law convinces us that, while the issue has not been specifically addressed in this jurisdiction, the Puerto Rico courts would not be prepared to recognize a duty of a doctor to violate the doctor/patient relationship, even to disclose the presence of AIDS to a spouse. The Puerto Rico Legislature has required doctors to report AIDS-positive tests to the Department of Health, but has never required or allowed that a doctor report AIDS to a spouse over the patient's objection. 24 L.P.R.A. §§ 571 *et seq.* Puerto Rico evidence law recognizes a strong doctor/patient privilege. 32 L.P.R.A. Ap. IV Rule 26. Although the Supreme Court of Puerto Rico does require disclosure in some cases before a tri-

bunal, *Garcia Negron* v. *Tribunal Superior*, 104 D.P.R. 727 (1976), it has never fashioned a court-made rule requiring disclosure of medical conditions to third parties. As a federal court sitting in diversity, we are not free to blaze new paths in local tort law, and we will not do so here. We note that on the federal level, recent Veterans Administration requirements *allow* for disclosure to a spouse, but *only* after certain conditions have been met. The new regulations do not require such disclosure. 38 U.S.C. § 4132. Were we to create a Puerto Rico disclosure duty which is broader than the federal statutory rule (if the Puerto Rico rule required absolute full non-discretionary disclosure to the spouse with no conditions precedent, for instance), thereby creating a tort law duty to disclose where the federal rule precludes disclosure, there might well be a Supremacy clause or preemption problem. Since we hold that Puerto Rico law does not recognize a duty to disclose to family members, we need not reach the Supremacy/preemption issue.

Complaint Amendment

Plaintiffs seek to amend the complaint to bring in the supplier of the blood, the American Red Cross, as a defendant. In *Kozup*, 663 F.Supp. at 1056, the Court found that no claim for failure to test the blood for AIDS could lie against the American Red Cross for blood collected in 1982 and transfused prior to January 1983 as no testing was then available. The claim of failure to inform plaintiff Diaz Reyes of her husband's condition is one that could lie, if at all, *only* against the hospital, not the 1981 blood supplier. We see no purpose in letting the amendment go forward where there is no cause of action which can be properly stated against the potential new defendant.

Advisory Jury

Plaintiffs petition the court to impanel an advisory jury pursuant to Rule 39(c) of the Federal Rules of Civil Procedure. The issue is mooted by today's decision.

Conclusion

1. Defendant's motion for summary judgment is GRANTED as to all issues.

2. The motion to amend the complaint and bring in the American Red Cross as a defendant is DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 19th day of July, 1991.

s/ J. A. FUSTE

JOSE ANTONIO FUSTE
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civil No. 89-1716 (JAF)

IGNACIA DIAZ REYES, FOR HERSELF AND IN REPRESENTATION OF HER MINOR SON ANGEL R. NEGRON DIAZ, EDGARDO NEGRON DIAZ, AND ALMA DIGNA NEGRON DIAZ,

PLAINTIFFS,

v.

UNITED STATES OF AMERICA,

DEFENDANT.

JUDGMENT

Pursuant to the terms of an Opinion and Order announced by the court today, judgment is now entered dismissing the complaint filed herein.

San Juan Puerto Rico, this 19th day of July, 1991.

s/ J. A. FUSTE

JOSE ANTONIO FUSTE
U.S. District Judge

APPENDIX E

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

Puerto Rico

Article 1802 Puerto Rico Civil Code; 31 L.P.R.A. sec 5141 (1930)

> 5141. Obligation when damage caused by fault or negligence.
>
> A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent improdence of the party aggrieved deos not exempt from liability, but entails a reduction of the indemnity.
>
> — Civil Code, 1930, Art. 1802; June 9, 1956, No. 28, p. 86, eff. June 9, 1956.

Federal

28 U.S.C. sec. 1254

> 1254. Court of appeals; certiorari; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(As amended June 27, 1988, Pub. L. 100-352 S. 2(a), (b), 102 Stat. 662)

28 U.S.C. sec. 1346 (2) (b)

1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims of:

(1) .....

(2) .....

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the Distrit Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary the court at the hearing of the option by examining the pleadings and the evidence before it and by interrogating counsel shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall there-

upon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other as is just.

(g) Affidavits made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affi-

davits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987)

38 U.S.C. 4132

4132. Confidentiality of certain medical records

(a) Records of the identity, diagnosis, prognosis, or treatment of any patient or subject which are maintained in connection with the performance of any program or activity (including education, training, treatment, rehabilitation, or research) relating to drug abuse, alcoholism or alcohol abuse, or sickle cell anemia which is carried out by or for the Veterans' Administration under this title shall, except as provided in subsection (e) of this section, be confidential, and (section 3301 of this title to the contrary notwithstanding) such records may be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) (1) The content of any record referred to in subsection (a) of this section may be disclosed by the Administrator in accordance with the prior written consent of the patient or subject with respect to whom such record it maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed in regulations prescribed by the Administrator pursuant to section 4134 of this title.

(a) Whether or not any patient or subject, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives written consent, the content

of such record may be disclosed by the Administrator as follows:

(A) To medical personnel to the extent necessary to meet a bonafide medical emergency.

(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaulation, but such personnel may not identify, directly or indirectly, any individual patient or subject in any report of such research, audit, or evaluation, or otherwise disclose patient or subject identities in any manner.

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient or subject, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(3) In the event that the patient or subject who is the subject of any record referred to in subsection (a) of this section is deceased, the content of any such record may be disclosed by the Administrator, or other personal representative of such patient or subject and only if the Administrator determines that such disclosure is necessary for such survivor to obtain benefits to which such survivor may be entitled, including the pursuit of legal action but then only to the extent, under such circumstances, and for such purposes as may be allowed in regulations prescribed pursuant to section 4134 of this title.

(c) Except as authorized by a court order granted under subsection (b) (2) (C) of this section, no record referred to in subsection (a) of this section may be used to initiate or

substantiate any criminal charges against, or to conduct any investigation of, a patient or subject.

(d) The prohibitions of this section shall continue to apply to records concerning any person who has been a patient or subject, irrespective of whether or when such person ceases to be a patient.

(e) The prohibitions of this section shall not prevent any interchange or records —

(1) within and among those components of the Veterans' Administration furnishing health care to veterans, or determining eligibility for benefits under this title; or

(2) between such components furnishing health care to veterans and the Armed Forces.

(f) Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.

Added Pub.L. 94-581, Title I, S 111(a)(1), Oct. 21, 1976, 90 stat. 2849.

Public Law 100-322 of May 20, 1988
102 Stat. 502, 503 — 38 U.S.C. sec. 7332

7332. Confidentiality of certain medical records

(a)(1) Records of the identity, diagnosis, prognosis, or treatment of any patient or subject which are maintained in connection with the performance of any program or activity (including education, training, treatment, rehabilitation, or research) relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus or sickle sell anemia which is carried out by or for the Department under this title shall, except as provided in subsections (e) and (f), be confidential, and (section 5701 of this title to the contrary notwithstanding) such records may be disclosed only for the purposes and under

the circumstances expressly authorized under subsection (b).

(2) Paragraph (1) prohibits the disclosure to any person or entity other than the patient or subject concerned of the fact that a special written consent is required in order for such records to be disclosed.

(b)(1) The content of any record referred to in subsection (a) may be disclosed by the Secretary in accordance with the prior written consent of the patient or subject with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed in regulations prescribed by the Secretary.

(2) Whether or not any patient or subject, with respect to whom any given record referred to in subsection (a) is maintained, gives written consent, the content of such record may be disclosed by the Secretary as follows:

(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaulation, but such personnel may not identify, directly or indirectly any individual patient or subject in any report of such research, audit, or evaluation, or otherwise disclose patient or subject identities in any manner.

(C)(i) In the cae of any record which is maintained in connection with the performance of any program or activity relating to infection with the human immunodeficiency virus, to a Federal or State law with the protection of the public health, and to which Federal or State law requires disclosure of such record, if a qualified representative of such authority has made a written request that such record be provided as required pursuant to such law for a purpose authorized by such law.

(ii) A person to whom a record is disclosed under this paragraph may not redisclose or use such record for a purpose other than that for which the disclosure was made.

(D) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient or subject, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

(3) In the event that the patient or subject who is the subject of any record referred to in subsection (a) is deceased, the content of any such record may be disclosed by the Secretary only upon the prior written request of the next of kin, executor, administrator, or other personal representative of such patient or subject and only if the Secretary determines that such disclosure is necessary for such survivor to obtain benefits to which such survivor may be entitled, including the pursuit of legal action, but then only to the extent, under such circumstances, and for such purposes as may be allowed in regulations prescribed pursuant to section 7334 of this title.

(C) Except as authorized by a court order granted under subsection (b)(2)(D), no record referred to in subsection (a) may be used to initiate or substantiate any criminal charges against, or to conduct any investigation of, a patient or subject.

(d) The prohibitions of this section shall continue to apply to records concerning any person who has been a patient or subject irrespective of whether or when such person ceases to be a patient.

(e) The prohibitions of this section shall not prevent any interchange of records —

(1) within and among those components of the Department furnishing health care to veterans, or determining eligibility for benefits under this title; or

(2) between such components furnishing health care to veterans and the Armed Forces

(f)(1) Notwithstanding subsection (a) but subject to paragraph (2), a physician or a professional counselor may disclose information or records indicating that a patient or subject is infected with the human immunodeficiency virus if the disclosure is made (A) to spouse of the patient or subject, or (B) to an individual whom the patient or subject has, during the process of professional counseling or of testing to determine whether the patient or subject is infected with such virus, identified as being a sexual partner of such patient or subject.

(2)(A) A disclosure under paragraph (a) may be made only if the physician or counselor, after making reasonable efforts to counsel and encourage the patient or subject to provide the information to the spouse or sexual partner, reasonably believes that the patient or subject will not provide the information to the spouse or sexual partner and that the disclosure is necessary to protect the health of the spouse or sexual partner.

(B) A disclosure under such paragraph may be made by a physician or counselor other than the physician or counselor referred to in subparagraph (A) if such physician or counselor is unavailable by reason of absence or termination of employment to make the disclosure.

(g) Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined, in the case of a first offense, up to the maximum amount provided under section 5701(f) of this title for a

first offense under that section and, in the case of a subsequent offense, up to the maximum amount provided under section 5701(f) of this title for a subsequent offense under that section.

(Added Pub.L. 94-581, Title I, Sec. 11(a)(1), Oct. 21, 1976, 90 Stat. 2849, Sec. 4132, and amended Pub.L. 100-322, Title I, Sec. 121, May 20, 1988, 102 Stat. 502; renumbered and amended Pub.L. 102-40, Title IV, Subsec. 401(a)(4)(A), 402(d)(1), 403(a)(1), (2), (4), (5), May 7, 1991, 105 Stat. 221, 239.)

Federal Rules of Evidence

Rule 801. Definitions

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if —

(1) . . . . . .

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(As amended Pub. L. 94-113, sec. 1, Oct. 16, 1975, 89 Stat. 576; Mar. 2, 1987, eff. Oct. 1, 1987).

Rule 803(8)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a

(1) . . . . . .
(2) . . . . . .
(3) . . . . . .
(4) . . . . . .
(5) . . . . . .
(6) . . . . . .
(7) . . . . . .

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Rule 804(b)(2)

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) . . . . . .

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) .....

(2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.